are guilty of falsehood and fraud, their principal is liable for the consequences which may flow therefrom. The true test of the liability of the principal in such cases is to ascertain whether, in committing fraud, the agent was acting in the business of his principal. If he was engaged in the course of his employment, then parties injured by his misconduct or fraud can resort for redress to the persons who clothed him with the power to act in their behalf, and who have received the benefits resulting from his agency."

So much for the liability of a corporation for the torts of its servants based on the theory of *respondeat superior*. Such liability as we have seen is imposed agreeably to an absolute rule of law based on grounds of public policy, and not upon the theory that the acts and motives of the servants are to be imputed to the master. The acts of the servant, done in the course of his employment, whether tortious or not, are not deemed those of the master. This is true where the master is a corporation just as much as where the master is an individual. It must not, however, be forgotten, that a corporation can act although not through its servants. The instrumentality through which a corporation acts is ordinarily its board of directors, or a meeting of its shareholders. The board of directors is not a servant of the corporation, but is a body authorized to act for the corporation. Its authorized acts are those of the corporation itself. But it can act for the corporation only within the scope of its authority, and when it acts without the scope of its authority, its acts are no longer those of the corporation. Hence it would seem that where the board of directors directly orders or procures the commission of any tortious act, the corporation cannot be visited with liability therefor. For the tortious act is not that of the company, since it was without the authority of the board, and the principle of *respondeat superior* cannot be invoked, since the board of directors is not the servant of the corporation. For this reason it would seem to be true, as Lord BRAMWELL states, "that no action (of malicious prosecution) lies, even if you assume the strongest case, namely, that of the very shareholders directing it, or the very directors ordering it," but not for the reason given by him, "because it is impossible that a corporation can have malice or motive," but because the act of the board of directors was *ultra vires*, and therefore not the act of the company. The same principle would apply to any other sort of tort, just as well as to malicious prosecution. Whether the tortious act ordered by a unanimous vote of the entire body of shareholders would be the act of the corporation, depends upon whether we regard the charter of the corporation as endowing it with its corporate powers, or defining the powers which it may exercise with the sanction of the law. See 2 Morawetz Corp., § 648 *et seq.* See, further, 8 Am. L. Reg. (O. S.) 701.

LOUIS M. GREELEY.

Chicago.

RECENT AMERICAN DECISIONS.

Supreme Court of Vermont.

CLARK *v.* CLARK'S ADM'R.

An action of assumpsit cannot be sustained for use and occupation of real estate, unless the relation of landlord and tenant exists under a contract express or implied; and a contract will not be implied when neither party expected payment of rent.

An executor, during the settlement of an estate allowed the father of the devisees to occupy lands bequeathed to them, neither party expecting payment, they living with their father, but never having had possession nor the right of possession; *held*, that assumpsit would not lie against their father's estate for the use, and that nothing could be recovered, although the case was tried under a reference.

The relation of parent and child tends rather to rebut than to raise the implication of a contract for rent.

ASSUMPSIT for use and occupation. Heard on a referee's report.

The referee found that the plaintiffs, unmarried young ladies, are the children of L. P. Clark, who died July 12th 1882; that one Wilkins, who deceased in July 1876, bequeathed the use of certain lands to the plaintiffs, another sister and their mother, Frances Clark; that these lands consisted of two farms, on one of which the said Wilkins, at the time of his death, said L. P. Clark, his wife and daughters, lived together as one family; that said Clark and his family continued to live on the farm until his death; that he had the control of both farms, and appropriated the income thereof to himself; that the executor left Clark in the "undisturbed possession" of both farms, and in his settlement of his accounts, in 1883, with the Probate Court, did not account for the rents and profits of said farms; that the amount of debts proved against the estate of Wilkins was $4540.24, including about $1700, for which he was liable only as surety of said L. P. Clark.

The said $1700 having been adjusted in some way, so as to release the estate of said Wilkins, on March 2d 1883, the Probate Court decreed said real estate among the devisees named in the will. In 1877 the executor sold some of said lands, and from the avails of these and the personal property received enough to pay the personal debts of said Wilkins; and the plaintiffs claimed that, as their father received the use of the lands for about five years after the personal debts had been provided for, his estate was liable. It was found that the farm was much improved under Clark's management; that the use of the farm, above improvements and taxes, was $100 per year; that one of the plaintiffs was generally at home, assisting her parents, and the other taught school, boarding at home for the most part of the time; and that the girls fully earned what they received from their father in the way of support.

E. R. Hard, for defendant.

Lyman E. Knapp and *F. E. Woodbridge*, for plaintiffs.

The opinion of the court was delivered by

ROSS, J.—These are actions of assumpsit to recover for the use and occupation of real estate. The facts on which, in our judgment, the cases turn are alike. It is, therefore, needless to allude to the questions presented by the facts in which they differ. It is well settled that to lay the foundation for a recovery in assumpsit for use and occupation of real estate, the relation of landlord and tenant must exist under a contract express or implied: *Stacy* v. *Vermont Cent. Rd.*, 32 Vt. 551; *Watson* v. *Brainard*, 33 Id. 83; *Chamberlin* v. *Donahue*, 44 Id. 57; *Moore* v. *Harvey*, 50 Id. 297; Tayl. Land. & Ten., sects. 25, 636 and *n.*; *Hough* v. *Birge*, 11 Vt. 190; *Strong* v. *Garfield*, 10 Id. 502; *Birch* v. *Wright*, 1 T. R. 378.

While in *Watson* v. *Brainard* it is said that in certain cases a contract will be implied from slight circumstances, the general holding in all the decisions is, that when the facts and circumstances are such as to rebut the expectation on the part of both parties of the payment of rent, the court will not imply a contract or promise to pay such rent. Thus, a contract to purchase and occupation under it (*Hough* v. *Birge*, *supra*); a contract or other fact inconsistent with the relation of landlord and tenant (*Stacy* v. *Vermont Cent. Rd.*, *supra*); a suit and judgment in ejectment (*Strong* v. *Garfield*, *supra*); occupation in the right of the wife and refusal to acknowledge the owner as landlord (*Chamberlin* v. *Donahue*, *supra*); occupation when the plaintiff denies the existence of any contract for the use of the premises (*Moore* v. *Harvey*, *supra*)—have each been held not to raise but to rebut the implication of a tenancy or the right to recover rent.

The referee has found that no express contract existed between the respective plaintiffs and the intestate in reference to his use and occupation of the premises; and he is unable to find that either party expected any payment of rent for the occupation by the intestate.

We think this finding, especially in connection with the other facts found in reference to the intestate's occupation of the respective premises, does not raise, but rebuts, the implication of the relation of landlord and tenant, and a contract to pay rent. By the terms of the bequests by which the plaintiffs acquired the right to the use of the premises, the profits arising from the use of the real estate, annually, were to be used by the testator's executor to pay

the balance of his indebtedness that should not be paid from the avails of his personal estate. Until the testator's debts were paid the executor was entitled to the rents. Such debts were not all paid until after the time for which the recovery of rent is claimed.

The debts which the testator incurred as surety for the intestate Clark were proved against the testator's estate, and were debts between the testator and the creditors, which belonged to the testator to pay. The payment of the debt was as much charged by the testator upon the use of the real estate bequeathed as was the payment of the testator's individual debts. There is no fact found that tends to show that the executor surrendered the possession of the lands devised to the devisees, these plaintiffs, at any time before he settled his administration account. Under these facts section 2137, R. L. would seem to be conclusive that the plaintiffs, until the decree of the Probate Court, had no right to the possession of the premises for which they now respectively seek to recover rent. That section reads: "When an executor or administrator is appointed and assumes the trust, no action of ejectment or other action to recover the seisin or possession of land, or for damage done to such land shall be maintained by an heir or devisee until there is a decree of the probate court assigning such lands to such heir or devisee, or the time allowed for paying debts has expired, unless the executor or administrator surrenders the possession to the heir or devisee."

During the time for which the plaintiffs seek to recover rent there was an executor in the active administration of the estate of the testator, charged by the will with the duty to use the rents and profits accruing from the land for the payment of his debts above what might be paid by his personal property; there were debts above what were paid from the personal property remaining unpaid, and nothing to show that the time allowed by the probate court for their payment had expired; and there had been no surrender of the possession of the devised lands by the executor to the devisees. The plaintiffs could not, therefore, during the time for which they claimed to recover rent have recovered the possession of the devised lands. The plaintiffs during that time were never in possession of the devised lands.

It follows logically that, not being at any time in possession, nor by the terms of the will entitled to possession, nor having the right

to recover possession, they cannot during said interval recover rent for the use of said devised lands.

The relation which existed between the plaintiffs and the intestate Clark, that of father and children, all residing harmoniously together on the premises as a family without any accounts being kept or charges made either for support, board or services, and without anything being said between them in regard to the use of said premises; and the manner in which the intestate used and carried on said devised lands, improving the land, building and repairing the buildings, also tend to rebut any implication of the relation of landlord and tenant, or of the payment of rent. Whether a child could recover for the use of its real estate occupied by a parent without an express contract, or circumstances which in law amount to a contract, we have no occasion to consider or decide. We only say that the existence of that relation tends rather to rebut than to raise the implication of a contract for rent. While between the plaintiffs and the intestate, in the way that the executor of Wilkins' estate settled his account with the Probate Court, without requiring the intestate to account for the use of the devised premises for nearly five years, it appears equitable that the plaintiffs should be compensated in some way from their father's estate for such use as has been beneficial to his estate, we are clear that on well-settled principles they, on the facts found, cannot recover for the use of the devised lands before they were legally entitled to the possession of such lands. What might have been their rights against the executor on the settlement of his administration account we have no occasion to consider.

The result is that the *pro forma* judgment of the county court for the plaintiff, in each case, is reversed, and judgment rendered for the defendant to recover his costs. Judgment to be certified to the Probate Court.

The rule announced in the principal case is that which generally prevails both in this country and in England, however unjust and inequitable it may appear. It is an old doctrine and is constantly invoked by the courts, yet a few cases seem to have in a manner repudiated it. The notion that the relation of landlord and tenant must exist between the parties, before the action of use and occupation can be maintained, is the essence of the doctrine. "Though the law will imply a contract to pay rent from the mere fact of occupation, yet this action lies only where the relation of landlord and tenant subsists between the parties, founded upon agreement, express or implied. But no implication can arise, if there was no tenancy in contemplation between them:" Taylor on Landlord and Tenant, sec. 636; or, as stated in the principal case, when the

facts and circumstances are such as to rebut the expectation on the part of both parties of the payment of rent; or if the position of the parties to each other can be referred to any other ground than that of a distinct tenancy, no promise to pay rent can be implied as in case of a mere trespasser: Abbott's Trial Evidence, 351; *Carpenter* v. *United States*, 17 Wall. 489; *Boston* v. *Binney*, 11 Pick. 1; *Holmes* v. *Williams*, 16 Minn. 164; *Mayo* v. *Fletcher*, 14 Pick. 525; *Ackerman* v. *Lyman*, 20 Wis. 454; *Bancroft* v. *Wardwell*, 13 Johns. (N. Y.) 490; *Henwood* v. *Cheeseman*, 3 S. & R. (Pa.) 500.

"To create the relation of landlord and tenant, an agreement, either express or implied, must exist. Presumptive evidence will not do, such as that the defendant holds over after the expiration of his lease by parol. But the facts must show, expressly or impliedly, that the defendant occupies as tenant of the plaintiff. * * * When a person occupies the land of another, not as tenant, but adversely, or where the circumstances under which he enters show that he does not recognise the owner as his landlord, this action will not lie:" *Butler* v. *Cowles*, 4 Ohio 213.

In *Hurley* v. *Lamoreaux*, 29 Minn. 138, the suit was for use and occupation of certain premises in the nature of assumpsit. The complaint contained no allegations of any facts showing that the relation of landlord and tenant subsisted between the plaintiff and defendant at the time of the alleged use and occupation. The court held that it failed to state a cause of action, and upon demurrer the suit was dismissed. The court said: "The plaintiff appears to claim that he has framed his complaint upon the theory of waiving a tortious entry and occupation of the premises by defendant, and suing upon an implied contract to pay for use and occupation. One obstacle in the way of this claim is that no tortious entry or occupation is in any way alleged. But the insuperable answer to it is found in the authorities above cited, which hold, in effect, that a trespasser cannot be converted into a tenant without his consent. In other words, to maintain an action for use and occupation, there must have been an agreement, express or implied, by which the relation of landlord and tenant is created between the parties. Privity of contract between them is indispensable."

In *Edmonson* v. *Kite*, 43 Mo. 176, 178, suit was brought for the rent, use and occupation of a house, the property of plaintiff. The evidence showed that the defendant did not rent the rooms of plaintiff. Defendant admitted occupancy, but stated that he occupied during the term in pursuance of orders from the military commander of the port. Plaintiff recovered in the trial court, but this judgment was reversed, the Supreme Court holding that the relation of landlord and tenant did not exist between the parties, and therefore no recovery could be had, that a trespasser could not be sued for use and occupation. Other Missouri cases have declared the same doctrine: *Hutton* v. *Powers*, 38 Mo. 353, 356, where one tenant in common sought to recover from his co-tenant for use and occupation, which was denied: *Cohen* v. *Kyler*, 27 Mo. 122; *Hood* v. *Mathis*, 21 Id. 308, 313; *O'Fallon* v. *Boismenu*, 3 Id. 405, 408–409; *The Aull Savings Bank* v. *Aull*, 80 Id. 199, 201, where defendant's agent occupied office room in a bank building for about four years; nothing was said about paying rent and no charges were made therefor on the bank's books; the action was dismissed: *Doyle* v. *O'Neil*, 7 Mo. App. 138, 141.

In *Central Mills Co.* v. *Hart*, 124 Mass. 123, 125, the evidence was, that trustees managing a railroad used, in common with the plaintiff and others, land owned by the plaintiff outside the location of the railroad. It was held, in the absence of any evidence of a demise, that the action could not be sup-

ported against the trustees, whether the use was by permission of the plaintiff or not. The court declared that to maintain the action, something in the nature of a demise must be shown, or some evidence given to establish the relation of landlord and tenant, and which relation could only grow out of contract; that the contract need not be technical and formal, but there must be at least a permissive occupation by the tenant. "Occupation by the tenant, with the assent of the landlord, is indispensable to the maintenance of the action." The court was of the opinion that, if the defendant occupied the premises by mere license of plaintiff—it being revocable at plaintiff's pleasure—so long as it remained executory, and until so countermanded, could only operate as an excuse for trespass, and that if the occupancy was not with plaintiff's permission, then it was a mere trespass and not a demise. "The relation of landlord and tenant in that case would have no existence between the parties." See *Wood* v. *Wilcox*, 1 Denio 37; *Merrill* v. *Bullock*, 105 Mass. 486, 490; *Goddard* v. *Hall*, 55 Maine 579; *Espy* v. *Fenton*, 5 Oregon 423, where it is said that if the relation of landlord and tenant does not exist, the possession is hostile, and the owner's remedy is by ejectment and for damages.

In *Marquette, &c., Rd.* v. *Harlow*, 37 Mich. 554, the action was against the railroad company for rent for the use and occupation of lands employed for the track. As there was no evidence of any agreement to pay for the use, the only question of liability arose out of what was claimed to be an implied obligation. The evidence was to the effect that the railroad company entered upon the land without the owner's knowledge or consent, but that afterwards he gave consent to building and grading the road, yet he told the company that it was to gain no rights of the soil; in fact, no rights whatever. The owner never offered to make a deed for the land, and the company never asked for one. The owner testified that he had repeatedly told the company that it was a trespasser, but had never given it notice to quit. Here it was held that the relation of landlord and tenant could not be inferred from the facts, and as such relation is the basis of the action, resting upon an express or implied agreement to pay rent during the tenantcy, which is wanting in this case, the action must fail. See *Dalton* v. *Laudahn*, 30 Mich. 349; *Hogsett* v. *Ellis*, 17 Mich. 351.

Moore v. *Harvey*, 50 Vt. 297, 300, was an action in assumpsit for use and occupation of a certain pasture. Plaintiff testified that he never hired the pasture to defendant; that defendant never agreed to pay for the use of it; that there was no contract whatever, and never had been, in respect to it; that he did not give defendant permission to occupy it. The plaintiff was denied a recovery: *Gallagher* v. *Himelberger*, 57 Ind. 63, is an instructive case, and fully sustains the rule of the above authority. See Wood's Landlord and Tenant, 6–10; *Stringfellow* v. *Curry*, 76 Ala. 394; *Newberg* v. *Cowan*, 62 Miss. 570.

In *Chamberlin* v. *Donohue*, 44 Vt. 57, the plaintiff and her daughter occupied a homestead left by the plaintiff's husband at his decease, without ever having had the same set out to them by the Probate Court. In the absence of the plaintiff, the daughter married the defendant, and he moved on to the place, and continued to occupy and enjoy it, refusing, on demand, to buy it, or leave it, or pay rent, but offering to let the plaintiff occupy with him, which she declined to do, and the defendant made no contract for the use. The plaintiff finally brought ejectment, which failed for want of notice to quit. In an action in assumpsit for the use and occupation, it was *held*, that the trial court should have submitted the case to the jury, to find whether or not an implied contract of tenancy existed. In giving the opinion, Ross, J., said:

"To lay the foundation for recovery in assumpsit for use and occupation, the relation of landlord and tenant must have existed between the parties, evidenced by a contract, either express or implied: *Stacy* v. *Vermont Central Rd.*, 32 Vt. 551; *Watson* v. *Brainard et al.*, 33 Id. 88; Taylor on Landlord and Tenant, sect. 636. Occupation alone will raise this relation by implication, only when the occupancy of the premises has been with the assent of the owner, and without any act or claim on the part of the occupant, inconsistent with an acknowledgment by the occupant of the owner as his rightful landlord: Taylor on Landlord and Tenant, sects. 636, 637. This implication may be rebutted by proof of a contract, or any other fact inconsistent with the existence of such a relation: *Stacy* v. *Vermont Rd.*, 32 Vt. 551; Taylor on Landlord and Tenant, sects. 636, 637. A contract to purchase and occupation under it, was held sufficient to rebut this implication of the existence of this relation arising from the occupancy, in *Hough* v. *Birge*, 11 Vt. 190. A suit and judgment in ejectment has been held to be conclusive evidence that this relation did not exist during the time mesne profits could be recovered in ejectment suit: *Strong* v. *Garfield*, 10 Vt. 502.

In *Chambers* v. *Ross*, 25 N. J. L. 293, 294, it is said that, "the law will imply a contract to pay rent from the mere fact of occupancy, unless the character of the occupancy be such as to negative the existence of a tenancy. The action for use and occupation does not necessarily suppose a demise." See *Dean and Chapter of Rochester* v. *Pierce*, 1 Camp. 467; *Hull* v. *Vaughan*, 6 Price 157; 2 Saund. Pl. & Ev. 890; Chitty on Contracts 332.

In *Richey* v. *Hinde*, 6 Ohio 371, it is held that this action lies only where a tenancy is established. The court observed: "In Massachusetts a suit like the present might be supported: 10 Mass. 433; 17 Id. 299. But in England and New York, and in this state, it is settled by authorities too strong to be disregarded, that an action for use and occupation will lie in these cases only where a tenancy subsists: 2 Taunt. 145; 11 Id. 105; 6 Johns. R. 46; 13 Id. 489; 4 Ohio 205. The defendant entered on the land as his own, claiming title; consequently the suit is not sustainable in this aspect."

Peters v. *Elkins*, 14 Ohio 344, holds that assumpsit for use and occupation will not lie at the suit of a purchaser of mortgaged premises, sold under a decree in chancery, against a tenant in possession under the mortgage.

This action lies where a person enters under an agreement for a term, although he subsequently refuses to accept the lease: *Little* v. *Martin*, 3 Wend. (N. Y.) 219; or where a tenant holds over after his term has expired, the presumption being that he holds as tenant under the same terms as he held under the lease; *Rusell* v. *Fabyan*, 34 N. H. 218; *Evertsen* v. *Sawyer*, 2 Wend. (N. Y.) 507; *Abeel* v. *Radcliff*, 13 Johns. (N. Y.) 297.

In *Mercer* v. *Mercer*, 12 Ga. 421, it is said that a contract to pay rent may be implied from the title of the plaintiff and the occupation of the defendant.

National Oil Refining Co. v. *Bush*, 88 Penn. St. 335, 340–341, does not seem to harmonize with the general current of authority, but is more in accord with the Georgia case just cited. Here the defendant claimed to hold under a written agreement, the plaintiff denied the agreement and notified the defendant that he would eject him if he did not quit the premises, as he considered him a trespasser. Subsequently the defendant abandoned his occupancy. The question whether or not the defendant was a trespasser was held to have been properly submitted to the jury. The lower court, in instructing the jury, told them that they must find some new contract between the par-

ties, that the presumption that the tenant was a trespasser, arising from the notices, might be rebutted. The Supreme Court, in holding this error, observed: "Such contract was not necessary to the maintenance of the action; it is not necessarily founded upon a specific contract, written or oral, but upon the use of the premises. The occupant may be, in fact, a trespasser, but the owner of the tenement may waive the trespass and recover in assumpsit, and it does not lie with the tort feasor to defeat him by interposing his own wrong. To tell the jury, therefore, that they must find some new contract between the parties, in order to rebut the presumption arising from the notices, was error, for the presumption might well be rebutted by the subsequent acts of the parties.

B. E. BLACK.

St. Louis.

Court of Chancery of New Jersey.

IN RE PERRINE, &c.

A deaf mute who does not understand any matter of business, and cannot be made to understand it, except it may be such as is of the most simple character, and who has no comprehension of business matters, obviously cannot manage his own affairs, and consequently is incapable of selecting an agent to transact them.

ON motion to set aside inquisition.

A. S. Appelget, for the motion.

The opinion of the court was delivered by

RUNYON, Ch.—The inquisition in this case is signed by nineteen of the twenty-four jurors. They find that the alleged lunatic "is of sound mind, and is capable of controlling her property by her own selection of a proper person to act for her." The other five certify that she is "not of sufficient understanding to enable her to manage her property." She is about sixty-five years old, and has never been married. The commissioners have made a report concerning her condition. They say that she is not an idiot or lunatic, in the popular sense of the words; that she has been a deaf mute ever since she was two or three years old; that she is ignorant, having never been taught any language, whether spoken or of signs; that she can neither read nor write, and cannot express to others her understanding, if any she have, of any business transaction; that she cannot be made to comprehend a business transaction, except, perhaps, a very ordinary one, involving no more money than a dollar or two; that she has learned to fetch and carry, and to do common, everyday housework,—that is, she can sweep, wash, cook an ordinary meal, &c.; that it is possible, by rude gestures, to com-